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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Amendment to the Commission's Rules )  
To Permit Flexible Service Offerings in the )  
Commercial Mobile Radio Services )

WT Docket No. 96-6

To: The Commission

**BELLSOUTH REPLY COMMENTS**

BellSouth Corporation ("BellSouth") hereby submits its reply to comments filed in response to the Commission's *Notice of Proposed Rule Making*, WT Docket No. 96-6, FCC 96-17, released January 25, 1996 ("*NPRM*"). BellSouth reiterates its support of the Commission's proposal to allow all CMRS providers to use their spectrum for both mobile and fixed wireless applications, without restriction, while ensuring regulatory parity for services which compete against one another, as set forth in BellSouth's initial comments. In these reply comments, BellSouth addresses the issue raised by Comcast Corporation ("Comcast"), in its comments, of imposing structural separation requirements on the in-region provision of commercial mobile radio service ("CMRS") by local exchange carriers ("LECs").

**I. SEPARATE SUBSIDIARY REQUIREMENTS ARE NO LONGER NECESSARY IN TODAY'S COMPETITIVE WIRELESS MARKETPLACE**

Comcast states in its comments that in order to develop the spirit of competition in the wireless marketplace envisioned by the Commission in its *NPRM* and by Congress in the Telecommunications Act of 1996 (the "1996 Act"), the Commission must "keep the state and federal regulatory arenas separate," by "impos[ing] structural separation on in-region incumbent LEC

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provision of CMRS.”<sup>1</sup> Comcast appears to have missed the objectives of both the 1996 Act and this proceeding, which are to facilitate competition, eliminate regulatory barriers to entry, and equalize regulatory treatment of competitors. These objectives are consistent with the principle of regulatory parity for CMRS set forth in the 1993 amendment to Section 332 of the Communications Act.<sup>2</sup> Regulatory parity requires that all competing providers of a service should be subject to the same degree of regulation. In carrying out this statutory mandate, the Commission in the past has undertaken to eliminate disparities between functionally equivalent services.<sup>3</sup> BellSouth submits that it should do so here as well and reject Comcast’s call for new regulatory restrictions to be imposed on one group of competitors should be rejected.

The Commission in its PCS proceedings, and more recently the United States Court of Appeals for the Sixth Circuit, have both found no articulate need for separate subsidiary requirements. Moreover, the Commission has found that the public is better served by nonstructural safeguards that defer any potential abuse while allowing the public to benefit from joint wireless and wireline service offerings. This is not the time or the forum for the Commission to step backwards and re-establish separate subsidiary requirements for specific CMRS services provided by LECs.

**A. The Commission Has Already Indicated Its Preference For Non-Structural Safeguards Over Separate Subsidiary Requirements**

The Commission has already found that structural safeguards are unnecessary and contrary to the public interest. In its PCS proceeding, GN Docket No. 90-314, the Commission found that

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<sup>1</sup> Comcast comments at 7.

<sup>2</sup> Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002.

<sup>3</sup> See *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1418 (1994); see also *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995) (questioning disparate regulatory treatment of similar services); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-33 (D.C. Cir. 1965).

imposing separate subsidiary requirements upon the BOCs would "preclude approximately 80 percent of the LEC industry from realizing any economies of scope between their wireline and wireless telephone services."<sup>4</sup> In fact, it determined that allowing the joint provision of wireless and local exchange services would benefit the public.<sup>5</sup> Accordingly, it held that a structural separation requirement would not serve the public interest.

The Commission additionally found that the concerns underlying the consideration of a separate subsidiary requirement could be addressed adequately through non-structural safeguards.<sup>6</sup> Accordingly, the Commission determined that "the cellular-PCS policies" adopted in the PCS proceeding would be sufficient and thus no new structural separation requirement was necessary for LECs providing PCS.<sup>7</sup> The Commission has recently made similar determinations that structural separation was unnecessary for LEC provision of SMR service<sup>8</sup> and CMRS in general.<sup>9</sup>

As recognized by the Commission in the PCS, SMR, and CMRS proceedings, sufficient safeguards currently exist within the cellular and PCS rules to ensure that LECs do not behave in an anticompetitive manner. Indeed, to impose structural separation requirements on LECs' CMRS

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<sup>4</sup> *New Personal Communications Services*, GN Docket No. 90-314, *Notice of Proposed Rule Making and Tentative Decision*, 7 F.C.C.R. 5676, 5705 (1992).

<sup>5</sup> *New Personal Communications Services*, GN Docket No. 90-314, *Second Report and Order*, 8 F.C.C.R. 7700, 7751 (1993).

<sup>6</sup> *Id.*; see also *Pacific Bell, Nevada Bell, Pacific Bell Mobile Services, and Pacific Telesis Mobile Services' Plan of Non-Structural Safeguards Against Cross-Subsidy and Discrimination*, GN docket No. 90-314, *Order*, DA 96-256 (W.T.B. Feb. 27, 1996) (holding that compliance with existing non-structural safeguards was sufficient).

<sup>7</sup> *New Personal Communications Services*, GN Docket No. 90-314, *Second Report and Order*, 8 F.C.C.R. 7700, 7751 (1993).

<sup>8</sup> *Eligibility for Specialized Mobile Radio Service*, GN Docket No. 94-90, *Report and Order*, 10 F.C.C.R. 6280, 6288-89, 6293-94 (1995).

<sup>9</sup> *Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1418 (1994).

operations that provide fixed wireless services would destroy the very benefits to the public that the Commission found warranted the joint provision of service in the PCS, SMR, and CMRS dockets.

The current rulemaking does not open the door to new and previously unauthorized methods of providing wireless services. Rather, it simply clarifies the Commission's existing rules explicitly to allow CMRS licensees to provide the broad range of fixed wireless services that the Commission has already found they should be able to provide. In fact, through this rulemaking, the Commission will remove the uncertainty that impedes the development of competition between local wireless and wireline service providers by assuring wireless operators the ability to provide local loop service.

Comcast's separate subsidiary requests stems from its unfounded assumption that LECs will "attempt to 'bootstrap' wireline local exchange service out of the state regulatory purview via the federal preemption over CMRS," and that without the separate subsidiary requirement "LECs could evade state regulation of local exchange service and jeopardize state ability to impose obligations consistent with the public interest on the incumbent LECs."<sup>10</sup> In fact, cellular and PCS licensees (including LECs) are currently able to provide fixed wireless services in the form of "auxiliary,"<sup>11</sup> "incidental"<sup>12</sup> or "ancillary"<sup>13</sup> services. If LECs have not used their ability to provide these services to avoid state regulation up to this point, and Comcast provides no such evidence, clarifying the rules to ensure that fixed wireless local loop service is permissible will give LECs no additional incentive to do so. In fact, as BellSouth maintained in its comments, the Commission has the ability

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<sup>10</sup> *Id.*

<sup>11</sup> 47 C.F.R. § 22.901(d)(1994).

<sup>12</sup> 47 C.F.R. § 22.323 (1994).

<sup>13</sup> *Second Report and Order*, 8 F.C.C.R. at 7712 (emphasis added); *accord New Personal Communications Services*, Gen. Docket 90-314, *Notice of Proposed Rule Making*, 7 F.C.C.R. 5676, 5689 (1992).

to allow state rate regulation if wireless local loop service becomes a substantial replacement for landline service.<sup>14</sup>

**B. The Courts Have Recently Determined That Separate Subsidiary Requirements Are Not Necessary In Today's Wireless Marketplace**

The United States Court of Appeals for the Sixth Circuit recently held that the Commission had articulated no reason for continuing to impose a structural separation requirement on BOC cellular operations, in light of the Commission's decision that such regulations were not needed for other wireless services. Thus, the court determined that the "disparate treatment afforded the Bell Companies impacts on their ability to compete in the ever-evolving wireless communications marketplace."<sup>15</sup> The Sixth Circuit recognized that the factual predicate that had justified the separate subsidiary requirement in the cellular context is no longer valid.<sup>16</sup> The court further noted that the Commission has found non-structural safeguards sufficient to prevent possible discrimination and cross-subsidization in the PCS industry, and absent a substantial reason for treating cellular differently, it held that it was arbitrary and capricious to retain the structural separation rule for cellular.<sup>17</sup>

These same safeguards can be applied to other services offered by LECs such as cellular and wireless local loop, without the establishment of separate subsidiaries. Such services are provided in the same manner, for the same frequencies, and using the same facilities as cellular, SMR, PCS, and other CMRS. In the absence of a factually supported basis for concern over discrimination and

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<sup>14</sup> BellSouth Comments at 4.

<sup>15</sup> *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995).

<sup>16</sup> *Id.* at 767.

<sup>17</sup> *Id.* at 768.

cross-subsidization of wireless local loop service in particular, it would be arbitrary and capricious to impose structural separation rules on such service offerings.

In the *NPRM* in this proceeding, the Commission proposes to allow broadband CMRS providers to offer fixed wireless local loop service over broadband CMRS frequencies.<sup>18</sup> Licensees should be allowed to use their spectrum to provide any service that responds to the needs of the public without the establishment of separate subsidiaries for the use of specific spectrum for a specific purpose. The “bright-line” division of spectrum use proposed by Comcast is inefficient, serves no benefit to the public interest, and actually hinders the growth of competition in the wireless marketplace.

Further some commenters advocate that the Commission establish a mechanism for ensuring that “mobile” use is involved in the provision of fixed wireless services.<sup>19</sup> Such a provision calls for the inefficient use of radio frequency spectrum and prevents CMRS providers from responding to the needs of their customers. As noted by AT&T Corp., after “investing billions of dollars in mobile facilities, most existing cellular providers will retain the primarily mobile character of their offerings.”<sup>20</sup> BellSouth urges the Commission to allow the marketplace determine the best use of a CMRS provider’s frequencies and prevent inefficient use of the spectrum.

**C. Comcast’s Structural Separation Proposal Is Beyond The Scope Of This Proceeding**

Finally, BellSouth notes that the *NPRM* made no mention that any new restrictions on ownership structure were under consideration in this proceeding. In fact, the *NPRM* made clear that

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<sup>18</sup> *NPRM* at ¶ 1.

<sup>19</sup> SMR Systems, Inc. and Digital Radio, L.P. Comments at 3; Go Communications Corporation Comments at 6.

<sup>20</sup> AT&T Corp. Comments at 4.

it was proposing to codify clearly what the Commission had intended when it adopted its existing rules.<sup>21</sup>

Comcast's proposal is well beyond the scope of the *NPRM*, and the adoption of structural separation rules would not be a "logical outgrowth" of the notice since an agency is required to publish notice of either the "substance of a proposed rule or a description of the subjects and issues covered by the proposed rule."<sup>22</sup> The Commission's *NPRM* in this proceeding is silent as to the establishment of separate subsidiary requirements for LEC CMRS providers offering fixed wireless services. Accordingly, the Commission has no authority to adopt structural separation rules without further notice and comment procedures. BellSouth submits that such procedures are unwarranted, in any event.

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<sup>21</sup> *NPRM* at ¶¶ 4-5, 9.


<sup>22</sup> *Horsehead Resource Development v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994), *cert. denied*, 115 S.Ct. 72 (1994).

## CONCLUSION

For the aforementioned reasons, BellSouth continues to support allowing CMRS providers to offer both fixed wireless and mobile wireless services over their assigned spectrum. The provision of such services by LECs, however, should not be based on a separate subsidiary requirement as proposed by Comcast.

Respectfully submitted,

BELLSOUTH CORPORATION

By: 

John F. Beasley

William B. Barfield

Jim O. Llewellyn

1155 Peachtree Street, N.E., Suite 1800

Atlanta, GA 30309-2641

(404) 249-4445

By: 

Charles P. Featherstun

David G. Richards

1133 21st Street, N.W.

Washington, DC 20036

(202) 463-4132

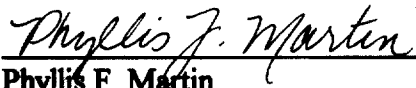
*Its Attorneys*

March 25, 1996



## **CERTIFICATE OF SERVICE**

I, Phyllis F. Martin, hereby certify that I have, this 25th day of March, 1996, served a copy of the foregoing "Reply Comments" by First-Class United States Mail, postage pre-paid to the individuals on the attached list.

  
\_\_\_\_\_  
Phyllis F. Martin

**Mary Brooner**  
**Manager, Wireless Regulatory Policies**  
**Motorola, Inc.**  
1350 I Street, N.W., Suite 400  
Washington, D.C. 20005

**Jay Keithley**  
**H. Richard Juhnke**  
1850 M Street, N.W., Suite 1100  
Washington, D.C. 20036-5807

**Diane R. Stafford**  
P.O. Box 11315  
Kansas City, MO 64112

**Susan W. Smith**  
**Century Cellunet, Inc.**  
3505 Summerhill Road  
No. 4 Summer Place  
Texarkana, TX 75501

**Michael F. Altschul**  
**Randall S. Coleman**  
**Cellular Telecommunications**  
**Industry Association**  
1250 Connecticut Avenue, N.W., Suite 200  
Washington, D.C. 20036

**Philip L. Verveer**  
**Jennifer A. Donaldson**  
**Michael F. Finn**  
**Willkie Farr & Gallagher**  
Three Lafayette Center  
1155 21st Street, N.W., Suite 600  
Washington, D.C. 20036-3384

**Kathleen Q. Abernathy**  
**David A. Gross**  
**AirTouch Communications, Inc.**  
1818 N. Street, N.W., Suite 800  
Washington, D.C. 20036

**Donald M. Mukai**  
**U S WEST NewVector Group, Inc.**  
3350 161st Avenue, S.E.  
Bellevue, Washington 98008-1329

**Pamela Riley**  
**AirTouch Communications, Inc.**  
One California Street, 28th Floor  
San Francisco, CA 94111

**Cathleen A. Massey**  
**Douglas I. Brandon**  
**AT&T Wireless Services, Inc.**  
1150 Connecticut Avenue, N.W., 4th Floor  
Washington, D.C. 20036

**Mark C. Rosenblum**  
**Judy Sello**  
Room 3244J1  
295 North Maple Avenue  
Basking Ridge, NJ 07920

**Alliance of LEC-Affiliated Wireless**  
**Services Providers**  
**David L. Nace**  
**Lukas, McGowan, Nace & Gutierrez, Chtd.**  
1111 19th Street, N.W., 12th Floor  
Washington, D.C. 20036

**Maureen O. Helmer**  
**Penny B. Rubin**  
**Susan M. Narkewicz**  
**New York State Dept. of Public Service**  
**Three Empire State Plaza**  
Albany, NY 12223-1350

**Jonathan M. Chambers**  
1801 K Street, N.W., Suite M-112  
Washington, D.C. 20006

\* Via Hand Delivery

**Cheryl A. Tritt**  
**Charles H. Kennedy**  
**James A. Casey**  
**Morrison & Foerster, LLP**  
**2000 Pennsylvania Ave., N.W., Suite 5500**  
**Washington, D.C. 20006**

**Caressa D. Bennet**  
**Michael R. Bennet**  
**Bennet & Bennet, PLLC**  
**1831 Ontario Place, N.W., Suite 200**  
**Washington, D.C. 20009**

**Wayne V. Black**  
**John Reardon**  
**Keller and Heckman**  
**1001 G Street, N.W., Suite 500W**  
**Washington, D.C. 20001**

**James P. Tuthill**  
**Betsy Stover Granger**  
**Pacific Telesis Group**  
**4th Floor, Building 2**  
**4420 Rosewood Drive**  
**Pleasanton, CA 94588**

**James L. Wurtz**  
**Margaret E. Garber**  
**1275 Pennsylvania Avenue, N.W.**  
**Washington, D.C. 20004**

**Danny E. Adams**  
**Edward A. Yorkgitis, Jr.**  
**Kelley Drye & Warren**  
**1200 Nineteenth Street, N.W.**  
**Washington, D.C. 20036-2423**

**Michael B. Azeez**  
**PCS One, Inc.**  
**2500 English Creek Avenue, Bldg. 11**  
**Egg Harbor Township, NJ 08234**

**Richard Ekstand**  
**Rural Cellular Association**  
**2120 L Street, N.W., Suite 520**  
**Washington, D.C. 20037**

**Paul Rodgers**  
**Charles D. Gray**  
**James Bradford Ramsay**  
**National Association of Regulatory**  
**Utility Commissioners**  
**P.O. Box 684**  
**Washington, D.C. 20044**

**Gene DeJordy**  
**Western Wireless Corporation**  
**330 120th Avenue, N.E., Suite 200**  
**Bellevue, WA 98005**

**Alan R. Shark**  
**Jill M. Lyon**  
**American Mobile Telecommunications**  
**Association, Inc.**  
**1150 18th Street, N.W., Suite 250**  
**Washington, D.C. 20036**

**Elizabeth R. Sachs, Esq.**  
**Lukas, McGowan, Nace & Gutierrez, Chtd.**  
**1111 19th Street, N.W., Suite 1200**  
**Washington, D.C. 20036**

**John A. Malloy, Esq.**  
**Leo R. Fitzsimon, Esq.**  
**GO Communications Corporation**  
**201 N. Union Street, Suite 410**  
**Alexandria, VA 22314**

**Jeffrey L. Sheldon**  
**UTC**  
**1140 Connecticut Avenue, N.W., Suite 1140**  
**Washington, D.C. 20036**

**\* Via Hand Delivery**

Steven E. Watkins  
David Cosson  
L. Marie Cuillory  
Attorneys for National Telephone Cooperative Association  
2626 Pennsylvania Avenue, N.W.  
Washington, D.C. 20037

Stephen L. Goodman  
Halprin, Temple, Goodman & Sugrue  
1100 New York Avenue, N.W., Suite 650 E  
Washington, D.C. 20005

John G. Lamb, Jr.  
Northern Telecom Inc.  
2100 Lakeside Boulevard  
Richardson, TX 25081-1599

Timothy R. Graham  
Leo I. George  
Joseph M. Sandri, Jr.  
Winstar Communications, Inc.  
1146 19th Street, N.W.  
Washington, D.C. 20036

Stuart Polikoff  
Lisa M. Zaina  
OPASTCO  
21 Dupont Circle, N.W., Suite 700  
Washington, D.C. 20036

Jonathan D. Blake  
Kurt A. Wimmer  
Counsel for Telular Corporation  
Covington & Burling  
P.O. Box 7566  
Washington, D.C. 20044

James F. Ireland  
Theresa A. Zeterberg  
Cole, Raywid & Braverman, LLP  
1919 Pennsylvania Ave., N.W., Suite 200  
Washington, D.C. 20554

Robert S. Foosaner  
Lawrence R. Krevor  
Laura L. Holloway  
Nextel Communications, Inc.  
800 Connecticut Avenue, N.W., Suite 1001  
Washington, D.C. 20006

Frederick M. Joyce  
Christine McLaughlin  
Attorneys for Celpage, Inc.  
Joyce & Jacobs  
1019 19th Street, N.W., 14 Floor-PH2  
Washington, D.C. 20036

Mark J. Golden  
Robert R. Cohen  
Personal Communications Industry Association  
500 Montgomery Street, Suite 700  
Alexandria, VA 22314-1561

R. Michael Senkowski  
Katherine M. Holden  
Stephen J. Rosen  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

Mark J. O'Connor  
Counsel for Omnipoint Corporation  
Piper & Marbury, LLP  
1200 19th Floor, 7th Floor  
Washington, D.C. 20036

Brian Kierman  
InterDigital Communications Corp.  
781 Third Avenue  
King of Prussia, PA 19406

James Rowe  
Alaska Telephone Association  
4341 B Street, Suite 304  
Anchorage, AK 99503

\* Via Hand Delivery

Terrence P. McGarty  
COMAV, LLC and The  
Telmarc Group, Inc.  
24 Woodbine Road  
Florham Park, NJ 07932

Fred Daniel  
d/b/a/ Orion Telecom  
P.O. Box 9227  
Newport Beach, CA 92660

Michael J. Shortley, III  
Attorney for Frontier Corporation  
180 South Clinton Avenue  
Rochester, NY 14646

Donald C. Rowe  
The NYNEX Companies  
1111 Westchester Avenue  
White Plains, NY 10604

Leonard J. Kennedy  
Christina H. Burrow  
Counsel for Comcast Corporation  
Dow, Lohnes & Albertson  
1200 New Hampshire Ave., N.W., Ste. 800  
Washington, D.C. 20036

Robert M. Lynch  
Bruce E. Beard  
David Brown  
Counsel of SBC Communications Inc.  
175 E. Houston  
San Antonio, TX 78205

Kevin C. Gallagher  
360° Communications Company  
8725 Higgins Road  
Chicago, IL 60631

Bruce D. Jacobs  
Glenn S. Richards  
Theodore N. Stern  
Fisher Wayland Cooper Leader &  
Zaragoza LLP  
2001 Penna. Ave., N.W., Suite 400  
Washington, D.C. 20006

Lon C. Levin  
AMSC Subsidiary Corporation  
10802 Park Ridge Boulevard  
Reston, VA 22091

James G. Pachulski  
Edward D. Young, III  
Counsel for Bell Atlantic Telephone  
Companies  
1320 North Court House Road, 8th Floor  
Arlington, VA 22201

Frank Michael Panek  
Attorney for Ameritech  
2000 West Ameritech Center Dr., Rm 4H84  
Hoffman Estates, IL 60196-1025

John T. Scott, III  
Crowell & Moring  
1001 Pennsylvania Ave., N.W.  
Washington, D.C. 20004

S. Mark Tuller  
Bell Atlantic NYNEX Mobile, Inc.  
1890 Washington Valley Road  
Bedminster, NJ 07921

Catherine R. Sloan  
Richard L. Fruchterman  
Richard S. Whitt  
WorldCom, Inc. d/b/a LDDS WorldCom  
1120 Connecticut Ave., N.W., Suite 400  
Washington, D.C. 20036

\* Via Hand Delivery

**Steven H. Schulman**  
**Lathan & Watkins**  
1001 Penna. Ave., N.W., Suite 1300  
Washington, D.C. 2004

**Jeffrey S. Bork**  
**Coleen M. Helmreich**  
**Dan L. Poole**  
**U S WEST, Inc.**  
1020 19th Street, N.W., Suite 700  
Washington, D.C. 20036

**Ronald L. Plessner**  
**Mark J. O'Connor**  
**Counsel for Commercial Internet Exchange**  
**Association**  
**Piper & Marbury, LLP**  
1200 19th Street, N.W., 7th Floor  
Washington, D.C. 20036

**Andre J. Lachance**  
**GET Service Corporation, et al.**  
1850 M Street, N.W., Suite 1200  
Washington, D.C. 20036

**\* Via Hand Delivery**